Supreme Court, U.S.
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No. 98-934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OBIORA E. EGBUNA,

Petitioner,

vs.

TIME-LIFE LIBRARIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can an undocumented alien who is statutorily disqualified from being hired to work in the United States under the Immigration Reform and Control Act of 1986, and who thus lacks an objective qualification required by the employer and by law, maintain a cause of action alleging that he was unlawfully denied employment in violation of the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964?

PARTIES TO THE PROCEEDING

All parties are identified in the caption to this case.

CORPORATE DISCLOSURE STATEMENT

Respondent Time-Life Libraries, Inc. is a subsidiary of Time Inc., which is a subsidiary of Time Warner Inc. Respondent has no nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals, *en banc*, Pet. App. 1a-12a, is reported at 153 F.3d 184. The earlier panel decision, Pet. App. 13a-21a, is reported at 95 F.3d 353. The opinion of the district court, Pet. App. 22a-24a, is not reported.[1]

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 19, 1998. This Court granted petitioner until December 7, 1998, to file his petition for certiorari. The petition was filed on December 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATEMENT OF THE CASE

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), protects employment applicants from personnel actions that discriminate against them because of their opposition to practices that are unlawful under Title VII or because of their participation in an investigation, proceeding, or hearing under Title VII. Petitioner seeks review of a court of appeals' ruling that an undocumented alien who is statutorily disqualified from working in the United States by the Immigration Reform and Control Act of 1986 ("IRCA") cannot establish a claim of unlawful refusal to hire, under the anti-retaliation provisions of Title VII, against an employer who complies with the IRCA's prohibition against the hiring of undocumented aliens.

Petitioner is a Nigerian national. Pet. App. 2a. Respondent is a telemarketer that sells books and other products. In 1989, respondent hired petitioner as a telephone sales representative

1. "Pet. App." refers to the appendices attached to the petition for writ of certiorari. "Jt. App." refers to the parties' joint appendix to the Fourth Circuit.

at respondent's Alexandria, Virginia facility. Pet. App. 2a; Jt. App. 44. At that time, respondent verified that petitioner had a valid student work visa, issued by the United States Immigration and Naturalization Service, that authorized him to work in the United States. Pet. App. 2a.; Jt. App. 8. Although this authorization expired in December of 1989, petitioner was employed by respondent until April of 1993. Pet. App. 2a.

While employed by respondent, petitioner received complaints of sexual harassment from a male subordinate. *Id.* Petitioner failed to report these complaints, however, in violation of company policy. *Id.* Later, when respondent investigated a discrimination charge filed by the subordinate with the Equal Employment Opportunity Commission, petitioner corroborated many of his subordinate's allegations. *Id.* at 2a-3a.

In April of 1993, petitioner resigned his position with respondent to return to Nigeria. *Id.* at 3a. His plans changed, however, and, in June of 1993, he applied for employment in the United States with respondent. *Id.* at 3a.[2] At this time, petitioner's student visa had expired and he was in the United States illegally. Under federal law, petitioner could not be employed in the United States because he was neither lawfully admitted for permanent residence, nor authorized to be employed in the United States by the Attorney General. Pet App. 2a-3a; IRCA, 8 U.S.C. § 1324a.

On July 21, 1993, respondent informed petitioner that he would not be hired. *Id.* At that time, respondent had not yet

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2. Prior to applying for reemployment with respondent, petitioner applied for employment with another employer, St. Anthony's Press. When St. Anthony's Press demanded that petitioner produce documentation showing that he was authorized to work in the United States, petitioner informed St. Anthony's that he could not produce this documentation because he had lost his wallet. Jt. App. 75-76.

requested documentation of petitioner's work authorization, and was not aware that petitioner lacked authorization to work in the United States. Had the employment application process continued, respondent would have learned during its legally-required hiring screen that petitioner was an undocumented alien, and, therefore, that it was illegal for respondent to hire petitioner. *See* IRCA, 8 U.S.C. § 1324a(b) (requiring pre-employment verification of authorization for employment). Respondent would not have rehired petitioner because federal law precluded respondent from hiring him. Consistent with the IRCA, respondent did not employ applicants who could not provide documentation that they could be lawfully employed in the United States. Jt. App. 79-80.

In February of 1995, petitioner filed this lawsuit alleging that respondent's refusal to hire him constituted unlawful retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Pet. App. 3a; Jt. App. 2. Respondent filed a motion for summary judgment, arguing that where an employer complied with the mandatory hiring requirements of the IRCA, authorization to work in the United States was a qualification that a Title VII plaintiff had to demonstrate in order to establish a *prima facie* case of hiring discrimination. Pet. App. 3a, 18a. In opposing the motion, petitioner argued that a genuine issue of material fact existed as to whether respondent would ultimately have refused to employ the petitioner because of his undocumented status. Pet. App. 19a.

The district court granted respondent's motion for summary judgment, adhering to a long and consistent line of precedent holding that a hiring discrimination plaintiff must — in order to establish a *prima facie* case — demonstrate that he possessed the objective minimal qualifications for employment. Citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),[3] the

3. In *McDonnell Douglas v. Green*, the Court first articulated the elements that establish a *prima facie* case of employment discrimination. (Cont'd)

district court concluded that petitioner could not maintain an action for discriminatory refusal to hire because he was unqualified for employment by virtue of his failure to possess legal documentation authorizing him to work in the United States. Pet. App. 23a. Consequently, the petitioner could not demonstrate that respondent's refusal to hire him was unlawful. *Id.*

Petitioner appealed, and a divided panel of the court of appeals reversed, finding that "work eligibility is not part of the prima facie case." Pet. App. 14a. The court of appeals granted rehearing *en banc*, vacated the panel decision, and affirmed the district court. *Id.* at 2a, 8a.

The *en banc* court held that an undocumented illegal alien, who is statutorily disqualified from employment in the United States, cannot bring a claim of hiring discrimination under Title VII when he is denied employment in the United States. *Id.* 7a-8a. The court found that because the IRCA requires employers to determine the eligibility of each new hire before the person

(Cont'd)
In *McDonnell Douglas*, the complainant was an African-American who had been laid-off in the course of a general reduction in force. He applied for reemployment when the company subsequently advertised for his occupation. The company rejected his application--not because of a lack of qualifications but because of his participation in illegal activities. Within this factual context, the Court stated that the complainant could establish a *prima facie* case of racial discrimination by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

begins work, and prohibits the employment of persons unable to document their eligibility, the law "statutorily disqualifies any undocumented alien from being employed as a matter of law." *Id.* at 6a.

The court of appeals rejected petitioner's reliance on *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), where the Court found that illegal aliens were covered by the National Labor Relations Act, on the grounds that the decision did not involve discrimination in the hiring process and preceded the IRCA's criminalization of the hiring of unauthorized aliens. Pet. App. 7a.

Judge Ervin and three other members of the court dissented, arguing that the majority's decision amounted to a holding that an undocumented alien could never establish a violation of Title VII and therefore conflicted with circuit court interpretations of *Sure-Tan* and this Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). Pet. App. 8a-11a.

REASONS FOR DENYING THE WRIT

The court of appeals' decision is correct, does not conflict with any other precedent, and has no application beyond the limited facts of this case.[4] No further review is warranted.

Petitioner characterizes the decision below as a broad holding that the IRCA implicitly excluded undocumented workers from coverage under the federal labor laws and created "a gaping 'quasi-standing' exception to this court's holding in *McKennon*." Pet. 8-9. Petitioner also contends that the decision conflicts with a number of post-IRCA circuit court interpretations of *Sure-Tan* and accentuates an existing conflict

4. Research reveals no other reported case in which an illegal alien has brought a wrongful failure to hire claim against an employer who could not lawfully hire him.

among the circuit courts as to the significance of evidence discovered subsequent to the employment decision at issue.

In fact, the Fourth Circuit's decision is quite narrow and does not conflict with either *McKennon* or its progeny. In *McKennon*, the Court held that evidence of theft by an employee, which was discovered post-termination and after the employer had articulated a different reason for the employee's termination, could not defeat a discrimination claim since the employee misconduct—being unknown to the employer at the time of the termination—could not have caused the employer to terminate the employee. The employer did not and could not argue that it would have learned of the misconduct prior to terminating the plaintiff's employment. The Court therefore found that the employer engaged in unlawful discrimination even though the employee's misconduct—if known—would have justified her termination. 513 U.S. at 359-63.

Here, in contrast to *McKennon*, the evidence is undisputed that respondent would have determined, prior to a final decision on whether to hire petitioner, that petitioner was an undocumented alien who was unqualified for employment as a matter of law, and, as mandated by federal law, would have refused to hire him. Thus, unlike the complainant in *McKennon*, petitioner was not and could not have been harmed by the allegedly discriminatory conduct.

The Fourth Circuit's decision does not create an exception to *McKennon* and other cases precluding an employer from defending against a discrimination claim on the basis of factors that could not have affected the decision at issue. Instead, the Fourth Circuit's decision holds only that an applicant who lacks a legally-mandated objective, minimal job qualification—that the employer in fact requires for employment—cannot establish a claim that he was discriminatorily denied employment. This holding is consistent with a long line of authority concerning

what a plaintiff must prove in order to establish a *prima facie* case of discrimination in hiring or promotion,[5] and respondent is aware of no reported case to the contrary.

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5. *See, e.g.*, **Supreme Court**: *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); **First Circuit**: *Rodriguez-Morales v. Veterans Admin.*, 931 F.2d 980, 983 (1st Cir. 1991) (no *prima facie* case where the plaintiff lacked the requisite experience); **Second Circuit**: *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 311-12 (2d Cir. 1997) (a plaintiff alleging discrimination under Title VII as a result of a selection decision must show, as part of the *prima facie* case, that he was qualified for the position); **Third Circuit**: *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1115-16 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) (a plaintiff can establish a *prima facie* case by showing that he possessed the qualifications set forth in the job description); **Fourth Circuit**: *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 762 (4th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec. 14, 1998) (No. 98-972) (plaintiff failed to establish a *prima facie* case that employer denied him position because of his race where plaintiff could not present evidence that he had the minimum qualifications necessary for the position because he did not possess the required license); **Fifth Circuit**: *Gonzalez v. Carlin*, 907 F.2d 573, 578 (5th Cir. 1990) (no *prima facie* case where the plaintiff had not yet acquired the requisite experience for the position sought); **Sixth Circuit**: *Daniels v. Board of Education*, 805 F.2d 203, 207-08 (6th Cir. 1986) (the *McDonnell Douglas* test for a prima facie case of employment discrimination "requires the plaintiff to prove . . . that he applied and was qualified for a job for which the employer was seeking applicants"); **Seventh Circuit**: *Holder v. Old Ben Coal Co.*, 618 F.2d 1198, 1202 (7th Cir. 1980) (plaintiff had not established a *prima facie* case of sex discrimination where she had not shown that she was qualified for any employment position at the time she was rejected for employment); **Eighth Circuit**: *Marzec v. Marsh*, 990 F.2d 393, 396 (8th Cir. 1993) (motive of official who allegedly excluded plaintiff from consideration was immaterial where plaintiff's promotion would have been precluded under agency rules requiring qualification that plaintiff lacked); *Hase*

(Cont'd)

Moreover, the significance of the IRCA to the decision below is merely that the statute has both established the minimum qualification in question and ensured that the employer actually determines whether the applicant possesses that qualification. While part of the court's reasoning in distinguishing *Sure-Tan* may have called into question the continuing viability of that decision in light of the IRCA, the court's discussion of *Sure-Tan* was not necessary to its holding.

I.

THE FOURTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH *McKENNON, McDONNELL DOUGLAS,* OR ANY CIRCUIT COURT INTERPRETATION OF THOSE DECISIONS.

Petitioner contends that the Fourth Circuit's decision accentuates a purported conflict in the circuit courts' treatment of "after-acquired evidence" in the employment context.

(Cont'd)
v. Missouri Div. of Employment Sec., 972 F.2d 893, 896 (8th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993) (second element of the *McDonnell Douglas-Burdine prima facie* case in the failure to promote context is "that the plaintiff meets the minimum qualifications for the position"); **Ninth Circuit**: *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988) (plaintiff did not establish a *prima facie* case of age discrimination in selection where there was no evidence that he was qualified for the positions in question); **Tenth Circuit**: *Thornton v. Coffey*, 618 F.2d 686, 690 (10th Cir. 1980) (to make out a *prima facie* case of discrimination in hiring plaintiff was required to prove that "he applied and was qualified for a job for which the employer was seeking applicants"); **Eleventh Circuit**: *Canino v. EEOC*, 707 F.2d 468, 470-71 (11th Cir. 1983) (employee could not make out a *prima facie* case of discriminatory denial of promotion where he lacked time-in-grade requirement for promotion); *Ferguson v. Veterans Admin.*, 723 F.2d 871, 873 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984) (employee could not make out a *prima facie* case of promotion discrimination where she lacked educational requirement for promotion).

Petitioner asserts that his undocumented status was the type of "after-acquired evidence" that the Court in *McKennon* found could not defeat an otherwise proven claim of discrimination under Title VII but could only affect the remedy. Pet. 19. In addition, petitioner contends that the Fourth Circuit's approach grafts a "quasi-standing" element onto Title VII. Petitioner argues that this aspect of the decision is similar to holdings of the Seventh Circuit and in conflict with decisions of the Third, Fifth, and Eleventh Circuits. Pet. 19-21.

The Fourth Circuit's decision does not conflict either with any decision of this Court or with any court of appeals decision, and there is no post-*McKennon* conflict among the other circuits. In *McKennon*, the Court unanimously rejected an employer's effort to defeat an age discrimination claim on the basis that improper conduct discovered subsequent to the plaintiff's termination, if known to the employer, would have caused the employer to terminate the plaintiff. Respondent does not contest that *McKennon* applies to hiring claims or that the decision's reasoning encompasses evidence concerning qualifications that would not have been considered in the hiring process. Nor does respondent contest that *McKennon*'s holding, though rendered in a case brought under the Age Discrimination in Employment Act, would apply to Title VII. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

Here, however, petitioner's reliance on *McKennon* is misplaced because federal law precluded the respondent from hiring the petitioner, and because it is undisputed that respondent complied with the requirements of that law both in determining an applicant's eligibility to work and in refusing to hire applicants who could not document their eligibility as required by federal law. Thus, in contrast to *McKennon*, where the subsequently discovered evidence did not demonstrate that the employer would have taken the same action regardless of any discriminatory intent, here the evidence demonstrates that

respondent would not have hired the petitioner because his undocumented status would have been disclosed during the hiring process.[6]

Petitioner obscures this critical distinction by referring to "the minimum qualifications that the employer *actually* considered" in describing the elements of a *prima facie* case articulated in *McDonnell Douglas* (Pet. 6; original emphasis); by characterizing the decision below as holding that employers may discriminate against individuals if it turns out that they lack an objective qualification, "albeit one that the employer did not consider in making its decision" (*id.* at 19); and by referring to "[a] qualification requirement that could not have been relied upon by an employer at the time the adverse decision was made because not inquired into at the time" as a factor that could not bear on motivation. *Id.* at 25. Respondent would have discovered and considered petitioner's undocumented status before the petitioner was hired, however, and that status would have precluded his employment. Petitioner's situation does not differ from any situation where a plaintiff alleges that he was discriminated against at one point in the process though he does not possess the qualifications that at a later stage in the process would have been required for his further consideration for

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6. Petitioner notes that the IRCA requires that employers secure a signed Form I-9 from the employee within three business days of hire, suggesting that the employer might have employed petitioner for up to three days before it would have discovered petitioner's undocumented status. Pet. 3, 27. The contention that petitioner might have a claim for the denial of employment for three days, however, was never made in the court of appeals, did not figure into the court of appeals' analysis, and cannot be raised for the first time here. *See United States v. Williams*, 504 U.S. 36, 41 (1992); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1927). In any event, the possibility that there might be a basis for such a contention in this case does not provide grounds for interpreting the court of appeals' decision beyond the reasoning reflected in the decision.

employment, *see Marzec v. Marsh*, 990 F.2d 393 (8th Cir. 1993), and cases cited at note 9, *infra*, save that the preclusive effect of that lack of qualification and the inevitability of the employer's inquiring into it—given the IRCA's requirements—are more certain than in the case of almost any other qualification that might be required for a particular job. *Compare Gonzalez v. Carlin*, 907 F.2d 573, 578 (5th Cir. 1990) (plaintiff's claim was barred because he had not acquired the requisite experience for the position sought).

Accordingly, the decision below conflicts with none of the court of appeals decisions cited by petitioner. Petitioner purports to identify a conflict with the decisions in *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir. 1994) (*Mardell I*), *vacated*, 514 U.S. 1034 (1995), *reaffirmed and reinstated upon remand*, 65 F.3d 1072 (3d Cir. 1995) (*Mardell II*), *Wallace v. Dunn Construction Co.*, 62 F.3d 374, 378-79 (11th Cir. 1995), and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108-09 (5th Cir. 1995). Pet. 21. These decisions rejected contentions that persons who had been hired could not maintain post-hire discrimination claims because they would not have been hired if their true qualifications had been known at the time they were initially employed. As demonstrated by the fact that each plaintiff had actually been hired, however, the later-discovered disqualifying information was not information that would have been discovered during the hiring process and caused the plaintiff not to be hired. *See Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1062 n.9 (11th Cir. 1994) (relying on this Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403-04 n.9 (1977),[7] the Eleventh Circuit

7. In *East Texas Motor Freight*, the Court found that plaintiffs could not represent a class of persons injured by a policy that precluded transfer from city driver to over-the-road driver positions, because, lacking qualifications for the over-the-road driver position, plaintiffs were not injured by the policy. 431 U.S. at 403-04.

distinguished a situation where disqualifying information would have been discovered if the plaintiff had progressed in the hiring process from " 'after acquired evidence' " cases where the employer sought to rely on information that it would not have discovered outside the litigation.)[8]

Petitioner repeatedly characterizes the Fourth Circuit's holding as importing a "quasi-standing" element into Title VII. Pet. 20, 22, 25. In arguing that this purported aspect of the decision deepens a conflict among the circuits, petitioner likens the decision to the pre-*McKennon* case of *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1251 (7th Cir. 1990), where the Seventh Circuit found that a plaintiff asserting post-hire discrimination claims could not meet "the quasi-standing elements set out in *McDonnell Douglas*" because evidence acquired after plaintiff made his claims showed that he lacked the veracity that was deemed a necessary qualification for a police officer. Pet. 19-20. Here, however, the *en banc* decision of the Fourth Circuit does not analyze the case in terms of "standing" or "quasi-standing." Moreover, the decision is critically different from *Gilty* because here it is undisputed that the petitioner's failure to meet a legally-required qualification

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8. Petitioner also cites *Smith v. Secretary of the Navy*, 659 F.2d 1113 (D.C. Cir. 1981), where the court found that a plaintiff had a cause of action to challenge a discriminatory evaluation, even though the plaintiff would not have received the promotion he sought regardless of the evaluation. Pet. 21-22. In *Smith*, however, the court found the plaintiff to be harmed by the evaluation because it both currently damaged his reputation and threatened him with the denial of future benefits. *Id.* at 1120 n.57. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (cause of action based on discriminatory seniority system arises at the time the system is adopted even though adverse effects of system may not be felt until some time in the future). *Smith* does not conflict with the decision below, since here the petitioner had no claim of an injury other than the denial of the job that his undocumented status would have prevented him from securing.

for employment would have been considered by respondent and would have precluded petitioner from being hired.

If there is a perceived conflict among the other circuits with regard to the proper application of controlling legal principles to arguably relevant qualifications that an employer would *not* initially have considered, this case is inappropriate for examining that conflict. However, inasmuch as *Gilty* is a pre-*McKennon* decision, aspects of which might well be reexamined by the Seventh Circuit post-*McKennon*, it cannot be said to create a conflict with any of the circuit courts' applications of *McKennon*.

Petitioner also likens the decision below to the Seventh Circuit's post-*McKennon* decision in *Senner v. Northcentral Technical College*, 113 F.3d 750 (7th Cir. 1997), which petitioner reads as affirming *Gilty's* "quasi-standing" approach. Pet. 20. But while *Senner* does rely on *Gilty* for the proposition that "[a] plaintiff must show he was qualified for the position he sought, or else he cannot prove injury," 113 F.3d at 755, *Senner* does not hold that a plaintiff denied employment must demonstrate some qualification other than those that the employer in fact considers in making its selection decision. Thus, *Senner*, like the decision below, is entirely consistent with the Third, Fifth, and Eleventh Circuit decisions petitioner cites in attempting to demonstrate a conflict.

In sum, the Fourth Circuit's *en banc* decision follows more than two decades of authority holding that hiring discrimination plaintiffs must show that they possess the qualifications that the employer considers in making hiring decisions. *See* note 5, *supra*.[9]

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9. That line of authority includes cases where qualifications, as here, involve licensing requirements and other criteria apart from the applicant's ability to perform the job in question. *See Lowery v. Circuit*

(Cont'd)

Petitioner argues that decisions such as *Mardell I*, 31 F.3d at 1230-31, indicate that any absence of qualifications not known to an employer is irrelevant. Pet. 21-21. However, none of the cases cited by petitioner has involved a situation where the qualification at issue necessarily would have been considered in the course of the decision-making process. In such a context, *McDonnell Douglas* and its progeny require that a causal connection be established between a failure to hire or promote and any actions of an employer that might be motivated by proscribed considerations. *See Marzec v. Marsh*, 990 F.2d 393 (8th Cir. 1993). Absent such a connection, a plaintiff cannot establish a cause of action under Title VII.[10]

(Cont'd)

City Stores, Inc., 158 F.3d 742, 762 (4th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec. 14, 1998) (No. 98-972) (plaintiff could not establish a *prima facie* case where he lacked required real estate license); *Marzec v. Marsh*, 990 F.2d 393 (8th Cir. 1993) (motive of official who allegedly discriminated against plaintiff was immaterial where plaintiff's promotion would have been precluded by agency rules); *Canino v. EEOC*, 707 F.2d 468, 470-71 (11th Cir. 1983) (employee could not make out a *prima facie* case of discriminatory denial of promotion where he lacked time-in-grade requirement for promotion); *Ferguson v. Veterans Admin.*, 723 F.2d 871, 873 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984) (employee could not make out a *prima facie* case of promotion discrimination where she lacked educational requirement for the position).

10. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). While the employment decision in *Price Waterhouse* resulted from a combination of motives, the case's holding makes clear that Title VII provided no cause of action to challenge a decision that the employer would have made regardless of any discriminatory motivation. 490 U.S. at 242 (plurality opinion). The Civil Rights Act of 1991 amended Title VII to provide that

> an unlawful employment practice is established when the complaining party demonstrates that race, color, religion,

(Cont'd)

The issue of standing was not briefed or argued in the courts below, and, as noted, the Fourth Circuit mentioned neither standing nor "quasi-standing" in its decision. However, to the extent that the decision below might be perceived as applying a quasi-standing or actual standing concept to the case before it, that concept is limited to situations where for a well-defined reason the plaintiff could not be harmed by the action he challenges. It is thus consistent with the Court's holdings on standing, which require that in order to maintain a cause of action challenging some conduct, a party must establish that he will suffer an "injury in fact" as a result of the challenged conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A person who lacks a qualification that is indisputably required for a position is not harmed by an arguably unlawful policy creating a barrier to his securing the position and hence would not have standing to challenge such policy. *See East Texas Motor Freight*, 431 U.S. at 403-04. By the same

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> sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). The courts have yet to determine whether "practice" as used in this section encompasses only those decisions actually affecting an individual or also encompasses each step in an employment process, whether or not the treatment at that step in the process had any role in the employment decision at issue. This section has no bearing here, however, since it applies only to claims involving race discrimination and other factors the consideration of which is proscribed by 42 U.S.C. § 2000e-2, and not to claims based on retaliation, which is proscribed by 42 U.S.C. § 2000e-3. *McNutt v. Board of Trustees of Univ. of Illinois*, 141 F.3d 706, 709 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 931-36 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 299 (1997); *Tanca v. Nordberg*, 98 F.3d 680, 682-85 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1253 (1997). Hence, the *Price Waterhouse* reasoning still would apply to such claims.

reasoning, an undocumented alien would not have standing to assert a claim of hiring discrimination on some legally proscribed basis in circumstances where his undocumented status would preclude his being hired, and hence preclude his being harmed by the allegedly discriminatory decision.[11] Contrary to the suggestion of petitioner, however, such reasoning would not apply to preclude challenges to post-hire conduct, such as racial or sexual harassment or discriminatory discharge, where the victim's undocumented status—or any similar disqualifying criterion that for some reason failed to prevent the individual from being hired—does not preclude the undocumented alien from being harmed by the challenged conduct.

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11. Petitioner cites *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993), and *Regents of the University of California v. Bakke*, 438 U.S. 265, 281 n.14, 320 n.54 (1978), for the proposition that a plaintiff experiences "an 'injury in fact' simply from being subjected to a discriminatory policy or decision even if the plaintiff cannot prove that he or she would have fared better under a nondiscriminatory policy or decision." Pet. 26. In *Northeastern Florida Contractors*, however, in holding that to establish standing a contractor barred from competing for certain set-aside contracts need not show that it would have received any contract absent the set-aside, the Court also held that the contractor must show that it was "able and ready to bid on contracts." 508 U.S. at 666. Thus, for example, a party lacking a license required to perform the work put up for bid could not show sufficient "injury in fact" to establish standing. Similarly, while in order to establish standing the plaintiff in *Regents of the University of California* did not have to show that he would have been admitted to medical school if the challenged minority set-aside were not in place, presumably he would have had to have been otherwise eligible to compete for admission by meeting such minimum objective qualifications as the possession of a college degree. *See Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 594 (10th Cir. 1996) (non-student plaintiffs lacked standing to challenge policy that allegedly discriminated on basis of gender in the rental of apartments reserved for students because, even in absence of the policy, plaintiffs would not have been qualified to rent the apartments).

II.

THE FOURTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH ANY LOWER COURT INTERPRETATION OF THIS COURT'S DECISION IN *SURE-TAN, INC. v. NLRB.*

In seeking review of the Fourth Circuit's decision, petitioner relies heavily on a purported conflict between that decision and various circuit court interpretations of this Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). For reasons explained above, however, neither *Sure-Tan* nor any of the cited cases interpreting it are relevant to issues raised in this case because, in contrast to those cases, the petitioner here was not affected by the refusal to hire that he seeks to challenge. With regard to its impact on the outcome here, the IRCA's significance is simply that, as in the case of a stringently enforced licensing requirement for example, the IRCA's mandate for verifying authorization to work in the United States establishes that petitioner's claim for unlawful refusal to hire must fail because petitioner could not have been hired. The compelling aspect of the instant situation is that there are few if any situations where the procedures for ensuring that the employer complies with the requirements of the law are so rigorous.[12]

Even if petitioner could have been affected by the alleged conduct, however, the decision below would not be inconsistent either with the *Sure-Tan* holding or with the cases interpreting it. In *Sure-Tan*, the Court reviewed a National Labor Relations Board order providing remedies for employees who were illegal aliens where the employer reported the employees to the Immigration and Naturalization Service ("INS") in retaliation

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12. *See* cases at note 9, *supra*.

for their union activities. In concluding that the National Labor Relations Act ("NLRA") covered aliens whose presence in the country violated the Immigration and Nationality Act ("INA"), the *Sure-Tan* decision, rendered prior to the enactment of the IRCA, noted that

> [s]ince the employment relationship between an employer and an undocumented alien is . . . not illegal under the INA, there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.

Id. at 893. The Court also reasoned that enforcement of the NLRA would further the purposes of the INA by reducing the incentive of employers to hire illegal aliens, which could further reduce the incentive of aliens to violate the immigration laws. *Id.* at 893-94.

In 1986, the IRCA made it unlawful for an employer to hire undocumented aliens or to continue to employ such individuals after the employer learns of their undocumented status. The circuit courts continued to interpret *Sure-Tan* as extending coverage of federal labor and employment laws to *employees* who were undocumented aliens, however. In doing so, the courts relied on *Sure-Tan*'s reasoning that providing such coverage reduced employer incentives to hire undocumented aliens. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 55 (2d Cir. 1997) (NLRA found to protect undocumented aliens allegedly discharged because of union activities); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992) (same);[13] *Patel v. Quality Inn South*, 846

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13. In *Del Rey Tortilleria v. NLRB*, 976 F.2d at 1118-22, the Seventh Circuit, relying on *Sure-Tan*, denied back pay to discharged employees for periods during which they were not lawfully in the United (Cont'd)

F.2d 700, 704-05 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (Fair Labor Standards Act found to apply to undocumented aliens); *NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987).[14]

Petitioner relies on this line of authority in arguing that the Fourth Circuit's decision creates a conflict among the circuits.[15] In doing so, petitioner repeatedly cites the reasoning in these cases, as in *Sure-Tan*, that failure to provide coverage would create an incentive for employers to hire illegal aliens. Pet. 12-16. That reasoning also figures prominently in Judge

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States. While Petitioner reads *Del Rey Tortilleria* as conflicting with the perceived holding in this case (Pet. 9, 16), petitioner also finds *Del Rey Tortilleria's* ruling on back pay to be in conflict with decisions of other circuits, and maintains that the decision below exacerbates this conflict. Pet. 18. However, since the court below made no ruling concerning back pay for a proven violation, this case would be unsuitable to resolve any conflict concerning remedial provisions of the NLRA, even assuming that identical standards would be applied under the two statutes.

14. In *Ashkenazy*, 817 F.2d at 75, the Ninth Circuit merely reaffirmed without discussion its pre-IRCA holding in *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986). In the earlier case, the Ninth Circuit interpreted *Sure-Tan* to allow back pay for periods during which unlawfully discharged workers remained in this country, finding that the availability of back pay to discharged undocumented aliens who remained in the country would be additional disincentive for employers to hire such workers. *Id.* at 719-20.

15. Petitioner also cites *Rios v. Steamfitters Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988), and *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516-17 (9th Cir. 1989), which are post-IRCA cases applying Title VII to undocumented aliens. Both decisions, however, involved pre-IRCA conduct, and each court noted that the result might be different under the new law. *Rios*, 860 F.2d at 1172 n.2; *Hacienda Hotel*, 881 F.2d at 1517 n.11.

Ervin's dissent. Pet. App. 10a. The need to decrease employer incentives to hire undocumented workers, however, has no applicability in the failure to hire context presented here. A holding that undocumented aliens may not maintain a cause of action for failure to hire would be fully supported by the rationales underlying those decisions.

Petitioner maintains that the court of appeals' decision stands for the proposition that undocumented aliens can maintain no cause of action for any violation of Title VII or other federal labor law. Pet. 9. Judge Ervin appears to share this view. Pet. App. 8a. However, given the Fourth Circuit's reading of the IRCA solely as rendering an undocumented alien as unqualified for employment—and its distinguishing *Sure-Tan* primarily on the basis that *Sure-Tan* did not involve a failure to hire—the Fourth Circuit's decision cannot be interpreted so broadly. *Sure-Tan*'s holding, while perhaps a proper subject for reexamination in light of the IRCA, is essentially irrelevant to the causality issue that defeats petitioner's cause of action. This, and the inapplicability of *Sure-Tan*'s reasoning to a hiring case, make this case an unsuitable vehicle for the Court to reexamine the *Sure-Tan* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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